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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. HOEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER, *Appellants*,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC., *Appellees*.

On Appeal from a Three-Judge United States District Court for the District of Maryland

MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
A. The Challenged Statute	2
B. The Proceedings Below	5
C. The Decision Below	6
ARGUMENT	9
A. Further Review Is Not Warranted	9
B. Primary Effect	11
C. Excessive Entanglement	17
D. Repayment of Grants	21
CONCLUSION	22

TABLE OF AUTHORITIES

CASES:

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 6, 9, 14
Durham v. McLeod, 413 U.S. 902 (1973) 10
Grit v. Wolman, 413 U.S. 901 (1973) 10
Hunt v. McNair, 413 U.S. 734 (1973) ..... *passim*
Lemon v. Kurtzman, 411 U.S. 192 (1973) 10, 21
Lemon v. Kurtzman, 403 U.S. 602 (1971) 6, 10, 14-15, 17-18
Levitt v. Committee for Public Education, 413 U.S. 472 (1973) 9
Sanders v. Johnson, 403 U.S. 955 (1971) 10
Sloan v. Lemon, 413 U.S. 825 (1973) 9
Tilton v. Richardson, 403 U.S. 672 (1971) ..... *passim*
Wolman v. Essex, 409 U.S. 808 (1972) 10

STATUTE:

Md. Code, Art. 77A, §§ 65-69 2-3

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Mount Saint Mary's College and The Associated Professors of Loyola College in the City of Baltimore, Inc. ("Loyola College") move to affirm the judgment below on the ground that the district court faithfully adhered to and applied the constitutional

principles set forth in this Court's decisions on the Establishment Clause issues raised by this appeal, thus rendering the questions presented so unsubstantial that further review by this Court is unnecessary.

QUESTIONS PRESENTED

1. Whether further review is warranted in light of the several recent decisions by this Court setting forth the governing constitutional principles on the Establishment Clause questions presented by this appeal and the district court's faithful adherence to and application of those governing principles in upholding the Maryland college aid program.

2. Whether the Maryland college aid program challenged by the appellants has generated a primary effect that either advances or inhibits religion.

3. Whether the administration of the Maryland college aid program has resulted in excessive government entanglement with religion.

4. Whether, if the Maryland college aid program is unconstitutional, the appellee colleges should be required to pay back funds awarded and paid to them during a period when the program had been declared constitutional.

STATEMENT OF THE CASE

A. The Challenged Statute

At its 1971 session, the Maryland General Assembly enacted a program of aid to private colleges and universities in the state to help alleviate the growing financial problems shared by those schools with private institutions of higher learning throughout the nation.

Md. Code, Art. 77A, §§ 65-69.[1] As the court below noted in its opinion, the formula by which funds appropriated under the aid program have been allocated among private colleges and universities in the state has been altered since the statute's enactment. J.S. App., pp. A-5 to A-6. Throughout its existence, however, the aid program has been designed to provide general-purpose grants to institutions that meet statutory eligibility requirements. In 1972, at its first session following this Court's decision in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Maryland General Assembly amended the statute to prohibit colleges receiving funds under the aid program from using those funds for "sectarian purposes." Md. Code, Art. 77A, § 68A.

To qualify for aid under the program, a college must (1) be nonprofit and accredited by the Maryland Department of Education, (2) have been in existence prior to July 1, 1970, (3) maintain one or more earned degree programs culminating in an associate in arts or baccalaureate degree, and (4) not award only seminarian or theological degrees. Md. Code, Art. 77A, § 66. The aid program is jointly administered by the appellee Board of Public Works and the Maryland Council for Higher Education ("Maryland Council"). Md. Code, Art. 77A, § 68. The evidence presented in the court below revealed, however, that the principal administrative responsibility rests with the Maryland Council, "which has considerable expertise as to the character and programs of the State's institutions of higher education derived from its other responsibilities." J.S. App., p. A-17.

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[1] The challenged statute is reprinted at pages A-52 to A-56 of the Appendix to the Jurisdictional Statement. The Appendix will be cited throughout this Motion as "J.S. App."

The Maryland Council engages in a two-level screening process "to ensure that funds are not improperly used." *Id.* The first level of screening involves an evaluation of applicant institutions to determine if they award principally theological or seminarian degrees, J.S. App., pp. A-17 to A-18, or if their educational programs are principally religious in nature. R. 1578-80, 1588-90.[2] Several institutions have been disqualified from receiving aid under that screening process. J.S. App. p. A-47.

The second level of screening involves a determination by the Maryland Council of whether funds paid to eligible colleges have been improperly spent in light of the statutory prohibition against "sectarian" use of those funds. At the time that a college applies for its annual grant, its president is required to verify that the funds will not be used for sectarian purposes. At the end of the fiscal year in which a grant is received, the college must submit a utilization-of-funds report detailing how the funds were spent. That report must be accompanied by an affidavit verifying that none of the expenditures were for sectarian purposes. J.S. App., pp. A-47 to A-48.

The Maryland Council has developed procedures for making further inquiry of colleges if their initial utilization-of-funds reports do not contain sufficient detail to permit evaluation of whether the funds were spent for proper purposes. The Maryland Council also can request a state audit of the grant funds if necessary, but "[t]he usage verification and the normal annual accounting which each college conducts" generally makes an audit unnecessary. J.S. App., p. A-48.

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[2] "R." refers to the trial transcript of this case.

B. The Proceedings Below

The appellants, four taxpayers of the State of Maryland, filed their complaint on March 29, 1972 alleging that the aid program they challenged violated the Establishment Clause of the First Amendment. Named as defendants were the Board of Public Works, three state officials who comprise the Board of Public Works and five colleges that had received state funds under the aid program.[3] The critical allegations of the complaint were that the five named colleges were "sectarian educational institutions" at which religion and religious activities infused the total educational program. Appellants requested an injunction against future operation of the aid program and an order requiring the appellee colleges to repay grant funds paid to them. A district court of three judges was convened pursuant to 28 U.S.C. §§ 2281, 2284.

After the disposition of several pre-trial motions, the appellants engaged in extensive discovery. The trial commenced on May 29, 1973 and continued intermittently over a period of several weeks, ending on June 26, 1973. The transcript of the trial is 1923 pages in length and contains the testimony of the presidents and staff and faculty members of the appellee colleges, one expert witness on the teaching of religion at the undergraduate level, and the staff member of the Maryland Council who administers the challenged aid program. In addition, the parties introduced several hundred documents into evidence.

At the conclusion of the trial, the parties submitted extensive proposed findings of fact and lengthy briefs

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[3] In addition to Loyola College and Mount Saint Mary's College, the appellee institutions are Western Maryland College, College of Notre Dame and St. Joseph College.

on the legal questions presented. Following oral argument, the court below issued its decision on October 16, 1974, ruling that the challenged statute was constitutional and that payment of public funds to the appellee colleges did not offend the Establishment Clause. J.S. App., p. A-1. Circuit Judge Bryan dissented. *Id.* at p. A-26. The court also entered separate findings of fact, to which all three judges subscribed. *Id.* at p. A-35.

C. The Decision Below

The court below found no merit in appellants' constitutional claims by applying the three-part Establishment Clause test of purpose, primary effect and excessive entanglement that this Court's decisions have evolved over the past several years. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971). The court below also scrupulously observed the sharp constitutional line this Court's decisions have drawn between public aid to the higher and lower levels of church-related education. See *Tilton* v. *Richardson, supra,* 403 U.S. at 685-86; *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 777 n.32 (1973).

Since there was no serious dispute that the challenged statute had the requisite secular purpose, the court below focused on the primary effect and excessive entanglement branches of the controlling Establishment Clause test. In evaluating the primary effect of the challenged aid program, the court below carefully considered the two factors that this Court has isolated to determine whether the primary effect is to advance religion—namely, whether the aid in question "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or . . . funds a specifically religious function in an otherwise substantially secular setting." *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

With respect to the first of those factors, the court below concluded that the appellee colleges "are not so pervasively sectarian that aid [to them] would have a primary effect of advancing religion." J.S. App., p. A-11. That conclusion was based on the court's specific finding that the appellee colleges "conform closely to the colleges approved in *Tilton* v. *Richardson, supra.*" J.S. App., pp. A-10 to A-11. The court buttressed that conclusion by its particularized findings that none of the appellee colleges practice religious discrimination in faculty hiring and student admissions, that none compel their students to attend religious exercises, that religion does not in any way slant the content of courses taught by the appellee colleges and that all of the colleges foster an atmosphere of unfettered academic freedom. J.S. App., pp. A-38 to A-45; *compare Tilton* v. *Richardson, supra,* 403 U.S. at 686-87.

The court below also ruled that the challenged aid did not have an invalid primary effect because "[t]he aid program . . . cannot be said to fund a 'specifically religious activity in a secular setting.'" J.S. App., p. A-11. That ruling was based on the court's finding that "there are sufficient safeguards [in the statute and its administration] to prevent the use of funds for sectarian purposes." *Id.* at p. A-12. The court qualified that conclusion in only one respect. Because the court in its findings stated it was legally without the power to determine how religion and theology courses at the

appellee colleges were taught, *Id.* at p. A-46, it ruled that using state funds to support such courses "cannot be justified." *Id.* at pp. A-12 to A-13. Because the court had found that the statutory prohibition against the use of state funds for sectarian purposes "must be interpreted as encompassing the study of religion or theology," *Id.* at p. A-50, the court ruled that the Maryland Council "must take steps to ensure that public funds are not used to support such programs." *Id.* at p. A-13.[4]

In its excessive entanglement analysis, the court below noted that this Court's decisions required it to evaluate the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between government and the religious authority." J.S. App., p. A-14. The appellants argued below, as they argue in their Jurisdictional Statement, that the nature of the aid provided is the critical variable in the entanglement equation and that the aid in question here is constitutionally infirm because, unlike the federal grants approved in *Tilton* v. *Richardson, supra,* it is not ideologically neutral. In an extensive analysis, the court below rejected that argument, *Id.* at pp. A-14 to A-21, relying principally on this Court's ruling in *Hunt* v. *McNair, supra,* that "the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." *Id.* at p. A-16. Because the court below had already found that

[4] Despite the professed inability of the court below to characterize how theology and religion are taught at the appellee colleges, it stressed that it was making no finding that those courses were in fact taught in a sectarian manner at those institutions. J.S. App., p. A-50 n.9.

the appellee colleges varied hardly at all in their character and purposes from the colleges involved in the *Tilton* case, it concluded that "[t]he relationship between church and state which results from this aid program is not entangling." *Id.* at p. A-17. Significantly, the court below also noted that the aid program this Court approved in *Hunt* v. *McNair, supra,* "established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration." *Id.* at p. A-21.

The dissent expressed no serious disagreement with the majority's analysis of how the aid program has functioned to date or of the essentially secular character of the appellee colleges. In fact, it would appear that the dissenting judge subscribed fully to the findings of fact entered by the full court. Rather, the dissent was based on the fear that the challenged aid program had the "potential" for generating an invalid primary effect or excessive entanglement sometime in the indefinite future. J.S. App., pp. A-28, A-32, A-34.

ARGUMENT

A. Further Review Is Not Warranted

Since June 1971, this Court has issued several major decisions which have defined with particularity and in a variety of factual contexts the limitations the Establishment Clause imposes on government's power to provide public funds to church-related educational institutions. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973); *Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Tilton* v. *Richardson,* 403 U.S. 672 (1971);

Lemon v. *Kurtzman*, 403 U.S. 602 (1971).[5] No other constitutional question has received such concentrated and definitive treatment by this Court during that period.

Those several decisions have evolved a rather precise test for evaluating the constitutionality of such aid programs, requiring an examination of the purpose of a challenged program and its primary effect and a determination of whether the program will foster excessive government entanglement with religion. *Lemon* v. *Kurtzman, supra*, 403 U.S. at 612-13. Those decisions have also drawn a sharp constitutional line between aid to church-related institutions of higher education and aid to the lower levels of church-related education. See, *e.g.*, *Tilton* v. *Richardson, supra*, 403 U.S. at 685-86. Since June 1971, this Court has struck down each program of aid to church-related elementary and secondary schools it has considered. By contrast, during the same period the Court has sustained each program of aid to church-related colleges that it has reviewed.

With respect to the Establishment Clause issue presented by this appeal, this Court has clearly fulfilled its constitutional duty to define the controlling constitutional criteria and to illustrate the application of those criteria in a variety of factual contexts. The time has now come to permit the lower courts to apply those criteria as challenges to new aid programs arise. Any other approach would necessarily require that this Court review each and every educational aid program

[5] See also *Durham* v. *McLeod*, 413 U.S. 902 (1973); *Grit* v. *Wolman*, 413 U.S. 901 (1973); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973); *Wolman* v. *Essex*, 409 U.S. 808 (1972); *Sanders* v. *Johnson*, 403 U.S. 955 (1971).

enacted by state legislatures and Congress in response to the financial crisis currently confronting private education in this country.

These appellees submit that plenary review by this Court of the Establishment Clause issue presented by this appeal is warranted only if the appellants can demonstrate convincingly that the court below disregarded the governing constitutional criteria established by this Court or applied those criteria in a manner inconsistent with the fundamental principles underlying those criteria. These appellees further submit, and will demonstrate below, that appellants have not made and cannot make any such showing. Even a cursory reading of the decision below, and the findings of fact upon which it is based, will reveal that the district court strictly and faithfully adhered to and applied the governing constitutional criteria set forth in this Court's recent decisions. Thus, the decision below should be summarily affirmed.

B. Primary Effect

This Court's decision in *Hunt* v. *McNair, supra*, succinctly delineated the scope of judicial inquiry to determine whether an aid program that benefits church-related colleges[6] has the primary effect of advancing religion.

[6] It is important to note that a total of 18 colleges and universities have received aid under the challenged Maryland program. J.S. App., p. A-37 n.2. More than two-thirds of those institutions have no religious affiliations. *Id.* at p. A-9. Thus, that program can in no sense be characterized as "a blunderbuss discharge of public funds to church-affiliated or church-related colleges," as the dissent does. *Id.* at p. A-29. The appellee colleges that are church-related receive funds under the program not because they are church-related but because they satisfy the religiously neutral eligibility requirements prescribed by the statute.

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting." 413 U.S. at 743.

It is that precise test that the court below applied in ruling that the Maryland aid program did not have an invalid primary effect. J.S. App., pp. A-10 to A-13.

Two central considerations underlie that primary effect ruling. First, the court below specifically found that the appellee colleges, in their character, purposes and educational programs, are virtual mirror images of the four church-related colleges held eligible for public funds in *Tilton* v. *Richardson, supra.* J.S. App., pp. A-10 to A-11. If direct grants to the *Tilton* colleges did not have the primary effect of advancing religion, it necessarily follows that direct grants to the appellee colleges can have no such invalid primary effect. Second, the review of the evidence by the court below satisfied it that "there are sufficient safeguards [in the statute and its administration] to prevent the use of funds for sectarian purposes." *Id.* at p. A-12. Indeed, with respect to these appellees, the court specifically found that they had not used grants awarded them for any religious purpose. *Id.* at pp. A-50 to A-51.

The dissent did not seriously quarrel with the majority's conclusions on those questions. It simply feared that there was a "potential" for an improper use of public funds at sometime in the indefinite future. *Id.* at p. A-28. However, this Court has specifically

rejected that argument as a basis for invalidating an aid program.

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement . . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton* v. *Richardson, supra,* 403 U.S. at 679.

Similarly in this case the specter of potential abuse raised by the dissent and appellants cannot cause the Maryland program to fall when the evidence demonstrates overwhelmingly that the primary effect of the program is not to advance religion in any manner.

Appellants' contention that the court below erred in its primary effect ruling is grounded in their fundamental misunderstanding of this Court's controlling Establishment Clause decisions and in their invitation to this Court to review the sufficiency of the evidence underlying the findings of fact below.

Appellants' principal primary effect argument is that the Maryland program provides no "guarantee" that public funds will not be used to advance religion. J.S., pp. 16-18. In developing that argument, appellants itemize a number of purposes for which the appellee colleges might use their state grants, such as payment of faculty salaries, scholarships and building maintenance. Appellants contend that this Court's decisions prohibit such use of public funds by church-related schools, relying principally on the *Lemon* and *Nyquist* decisions. Appellants ignore the fact that those two cases involved church-related elementary and secondary schools, which this Court ruled were

pervasively sectarian in nature. However, this Court has expressly ruled that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Tilton* v. *Richardson, supra,* 403 U.S. at 685. Thus, a particular use of public funds which may be impermissible in the parochial elementary and secondary school setting is not necessarily improper in the context of church-related higher education.

One example of this critical distinction will suffice. In the *Lemon* case, this Court invalidated aid programs which provided public funds to pay the salaries of teachers in parochial elementary and secondary schools. The Court noted that the typical parochial school teacher "is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith." 403 U.S. at 618. As the findings of fact entered by the court below convincingly demonstrate, the faculty members at the appellee colleges function in an educational environment that does not even remotely resemble that described in *Lemon.* Indeed, the court below expressly found that those faculty members "feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials." J.S. App., p. A-38. Thus, the constitutional dangers that this Court perceived in teacher payment programs in *Lemon* are totally absent from the higher education setting of this case.

Moreover, the appellants' assertion that the state has not "guaranteed" that public funds will not be

used for religious purposes is a patent distortion of the Maryland aid program and the evidence in this case. To the extent that use of grant funds to pay a chaplain's salary or to repair and maintain a chapel constitutes a religious use of public money, such expenditures are clearly prohibited by the sectarian use proscription of the statute. And the court below has expressly found that the administration of the aid program contains sufficient safeguards to assure there will be no such misuse of public money.

The remainder of the appellants' primary effect arguments are based on their disagreement with the findings of fact entered by the court below. To accept those arguments, this Court would, in effect, have to undertake a *de novo* review of the extensive evidentiary record in this case to determine whether there is sufficient evidence to support the findings. These appellees submit that, if the Court wishes to undertake such a review, it will find the evidence supporting the findings is not simply sufficient but overwhelming. Yet, the appellants ground their primary effect argument on evidence wrenched from context and totally at odds with the carefully considered findings of fact entered by the court below. A few examples of the conflict between appellants' arguments and the findings will suffice.

1. *Classroom Prayers:* Appellants contend that public funds under the challenged aid program are being used to support the practice of classroom prayers at the appellee colleges. Not only did the court below find the incidence of classroom prayers at Loyola College and Mount Saint Mary's College to be "miniscule," it also found no evidence that public funds were

being used in any fashion to support that isolated practice. J. S. App., pp. A-39 to A-40.[7]

2. *Religious Discrimination:* Appellants contend that the appellee colleges impose religious restrictions on faculty hiring and "perpetuate de facto religious restrictions on student admissions." J.S., pp. 20-21. The court below expressly found that the appellee colleges impose no religious restrictions on faculty hiring and student admissions. J.S. App., pp. A-40 to A-41, A-44.

3. *Advancement of Religion:* Appellants note that the appellee colleges require students to take some courses in theology as part of their liberal arts core curriculum. Appellants further note that "the study of religion or theology may become an instrument for strengthening the students' religious life." J.S., p. 21. Appellants ignore the fact that, although the court below declined to determine whether the theology courses in question were taught in an academic fashion, it specifically refused to make the finding that the appellants imply—namely, that the appellee colleges teach theology in a sectarian fashion. J. S. App., p. A-50 n. 9. Moreover, this Court ruled that aid to the colleges in *Tilton* did not have a primary effect of advancing religion even though each of those institutions required students to take theology courses. 403 U.S. at 686-87.

Thus, the appellants have provided no credible basis for concluding that the court below erred in its pri-

[7] It should be noted that the record in the *Tilton* case showed that at least one of the colleges involved in that case had a policy of permitting classroom prayers. Brief of Appellee Colleges and Universities. p. 11a. *Tilton* v. *Richardson, supra.* This Court, however, did not rule that aid to a college having such a practice had a primary effect of advancing religion.

mary effect ruling. That ruling was based on a strict adherence to the criteria set down in this Court's controlling Establishment Clause decisions. Appellants' arguments to the contrary are based on their misunderstanding of those decisions and their deliberate distortion of the evidentiary record in this case.

C. Excessive Entanglement

Whether an educational aid program engenders excessive governmental entanglement with religion requires an examination of

> "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615.

In applying those three factors in *Tilton* v. *Richardson, supra,* the Court did state that "[n]o one of these three factors standing alone is necessarily controlling." 403 U.S. at 688. However, an examination of the entanglement analyses by the Court in *Lemon, Tilton* and *Hunt* v. *McNair, supra,* reveals that one of those three factors—the character and purposes of the institutions that are benefited—is indeed the critical variable in the entanglement equation.

Thus, in *Lemon* the Court stated that "[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." 403 U.S. at 616. By contrast, the Court in *Tilton* found that, because religious indoctrination was not a substantial purpose of church-related colleges, there was less likelihood that religion would spill over into

the secular educational program, thus reducing the risk that public funds will support religious activity. The Court added: "Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." 403 U.S. at 687. Subsequently, in *Hunt* v. *McNair,* the Court articulated the obvious conclusion that flowed from the conflicting results in *Lemon* and *Tilton* on the entanglement question.

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies with the extent to which religion permeates the institution." 413 U.S. at 746.

Consistent with that observation in *Hunt,* the court below evaluated the risk of entanglement under the Maryland aid program principally by reference to the extent to which religion infused the educational programs of the appellee colleges. J.S. App., pp. A-14 to A-21.

Because the appellee colleges are virtually identical in the character, purposes and educational programs to the *Tilton* colleges, the court below concluded that the risk of excessive governmental entanglement with religion under the Maryland program was no greater than in *Tilton* and *Hunt.* The court noted that "these schools perform essentially secular educational functions and are quite similar to the defendant schools in *Tilton.* Religion does not permeate the secular educational functions of these schools." J.S. App., p. A-14. Since the statute requires the appellee colleges to confine the use of their grant funds to their secular educational functions, the state's supervision of the use of those funds will bring it into contact with the secular,

and not the religious, activities of those institutions. Thus, the administration of the aid program will result in no government involvement, let alone entanglement, with religion.

The appellants, however, insisted in the court below, as they do in their Jurisdictional Statement, that the nature of the aid provided is the critical variable in the entanglement analysis. They contend that prohibited entanglement can be avoided only if the aid provided is "ideologically neutral." While the appellants have been somewhat vague in defining the type of "ideological" neutrality they would impose on educational aid programs, the thrust of their agument would limit such programs to grants to construct the type of buildings involved in *Tilton.*

Based on this Court's decisions, the court below correctly rejected that argument. It is impossible to understand how the appellants can characterize the aid provided under the Maryland program as "ideological" in nature. The state is simply providing private colleges with money to help them support their secular educational programs. There is certainly nothing ideological about money. As the court below stated:

> "What emerges from a consideration of [the Supreme Court's] cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist.* The classes taught in *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon.* . . ." J.S. App., pp. A-15 to A-16.

An aid program acquires an ideological coloration, if at all, from the institutions that benefit from it. Since the appellee colleges are virtually identical in their character, purposes and educational programs to the *Tilton* colleges, the aid provided the appellee colleges is no more ideological than the aid provided in *Tilton*.

There is, of course, a difference between the type of aid provided under the Maryland program and the federal aid upheld in *Tilton*. The federal program provided special-purpose grants that could be used only for the construction of academic facilities. The Maryland program provides general-purpose, non-categorical grants that a recipient institution can use for any aspect of its secular educational program. However, as the court below ruled, the distinction between special-purpose and general-purpose grants "does not rise to constitutional dimensions." J.S. App., p. A-17. The Establishment Clause requires only that a church-related college receiving aid not use it for religious purposes, and the Maryland program imposes that very restriction on grant recipients. As long as that restriction is observed, it is constitutionally irrelevant that the aid be in the form of special-purpose or general-purpose grants.

The appellants also complain that the relationships that exist between state officials and the appellee colleges have resulted in excessive entanglement between government and religion. The court below came to the opposite conclusion based on its careful examination of the entire evidentiary record in this case. The court specifically ruled that "[t]he relationship between church and state which results from this program is not entangling." J.S. App., p. A-17. Indeed, the court below found that the relationship between state

officials and the appellee schools in the administration of the Maryland program is far less intimate and pervasive than the relationship that this Court ruled was non-entangling in *Hunt* v. *McNair, supra. Id.* at pp. A-20 to A-21.

Thus, there can be no question that the court below correctly concluded that the Maryland aid program challenged by the appellants has not resulted and will not result in excessive government entanglement with religion.

D. Repayment of Grants

In addition to seeking to enjoin the future operation of the Maryland aid program, the appellants requested in their complaint that the appellee colleges be ordered to repay all funds that have been awarded and paid to them under the program. The court below denied that relief with respect to the grants paid the appellee colleges prior to the initiation of this litigation. Appellants now seek similar relief from this Court.

If there is any legal obligation on the appellee colleges to repay the grants they have received, it will not arise, if at all, until this Court declares the Maryland aid program unconstitutional. Thus, that question is clearly premature at this stage of the appeal of this case. If the Court sets this case for plenary hearing, however, these appellees will argue in their brief on the merits that the equitable principles enunciated in *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973), would bar the appellants from obtaining an order for repayment of funds received by the appellee colleges during a period when the challenged aid program had been declared constitutional.

CONCLUSION

The judgment below should be affirmed summarily because the district court's faithful adherence to and application of the controlling Establishment Clause principles repeatedly articulated by this Court have rendered unsubstantial the questions the appellants ask this Court to review.

Respectfully submitted,

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